

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

THOMAS E. GLADDEN,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
BOBBY KEMPER, ET AL.,	:	
	:	
Defendants.	:	NO. 94-1876

**FINAL ADJUDICATION INCLUDING
FINDINGS OF FACT AND CONCLUSIONS OF LAW, VERDICT AND JUDGMENT**

Reed, J.

July 30, 1997

Procedural History and Background

Plaintiff Thomas E. Gladden ("Gladden" or "plaintiff") filed a complaint in the instant lawsuit on April 28, 1994, alleging that Police Officers Derek Howard ("Howard") and Thelma Evans¹ ("Evans") and Parole Officers Bobby Kemper ("Kemper") and Andrew Bevec ("Bevec") (collectively referred to as "defendants") violated federal and state laws on December 20, 1993 when Howard struck him on the head using excessive force during an arrest and thus committed assault and battery, when Kemper planted drugs upon Gladden and falsely arrested plaintiff, and when all four defendants conspired to violate the civil rights of plaintiff. After defendants filed their answer, plaintiff requested leave to file an amended complaint on June 17, 1994 and September 8, 1994. This Court granted plaintiff the requested relief and plaintiff filed his first amended complaint on October 14, 1994. Approximately one year later, on September 20, 1995, plaintiff filed a second amended complaint with permission of this Court. After defendants answered the second amended complaint, plaintiff filed a motion to strike portions of the answer, which the Honorable M. Faith Angell United States Magistrate Judge granted as to paragraphs 7 and 8. This Court

¹Since the date of the events at issue, Thelma Evans married and changed her surname to Miller. I will refer to her as Officer Evans, as that was her name during the course of events giving rise to this lawsuit.

denied the third request of plaintiff, made in November, 1995, to amend his complaint.

Defendants Kemper and Bevec filed a motion for summary judgment to which plaintiff responded. Judge Angell provided a report and recommendation and a supplemental report and recommendation regarding the motion. Plaintiff filed objections to both reports of Judge Angell. Upon independent review, this Court granted the motion, entering summary judgment in favor of defendants Kemper and Bevec and leaving Howard and Evans as the remaining defendants in the case.

The record indicates that plaintiff never requested the assistance of counsel and decided to proceed pro se. The facts giving rise to this litigation are not complex and the law is clear and settled. Plaintiff maintained the litigation of his case as evidenced by his filing of various motions on his own behalf and responses to the motions of defendants. The lengthy pre-trial history and the various papers filed by plaintiff show plaintiff pursued the proper offensive tactics by requesting the production of documents, seeking partial summary judgment, and filing objections to the two reports of Judge Angell, as well as the proper defensive tactics by responding to the motion of defendants Kemper and Bevec for summary judgment.

At the time of the final pre-trial conference and after clear explanation by this Court of the distinction between a jury and non-jury proceeding, and upon defendants' waiver, plaintiff waived his right to a jury trial.² This Court, with the consent of the parties, bifurcated the issues of liability and damages. For plaintiff this Court waived the requisite filing of pre-trial memoranda, as well as witness and exhibit lists. When asked at the final pre-trial conference about readiness to proceed to trial, plaintiff indicated that he had been

²Plaintiff had waived a jury trial upon filing his complaint, but defendants demanded a jury trial at that time thus preserving that status for both parties for trial, unless waived.

granted access to his legal papers and was prepared to proceed. During the non-jury trial on liability this Court confirmed that the relatively straight-forward factual issues dominated the case, plaintiff demonstrated understanding of the facts at issue, and plaintiff presented skilled articulate factual arguments. Plaintiff submitted several exhibits, including admissions of defendants in the pleadings and medical records. Therefore, I find that plaintiff is competent to proceed pro se.

Having conducted a non-jury civil trial on liability in which Gladden, proceeding pro se, and counsel for defendants Howard and Evans participated, and based upon the pleadings, the evidence presented at trial, and the declarations of counsel, I make the following findings of fact and conclusions of law:

Findings of Fact

1. Having been convicted of a felony for conduct not at issue in the instant lawsuit, Gladden, an African American, is currently a state parolee and resident of a halfway house at 1303 Susquehanna Avenue, Philadelphia, Pennsylvania.

2. Howard and Evans are police officers employed by the City of Philadelphia. Howard, an African American, has been working as a police officer since 1990 and Evans, also an African American, has served since 1992. On the day of plaintiff's arrest, December 20, 1993, Howard and Evans worked as patrol partners in the 16th Police District. Approximately three months later, the partnership ceased when Howard was reassigned. Testimony of Howard; testimony of Evans.

3. Neither Officer Howard nor Officer Evans has been the subject of a civil complaint or disciplinary action for civil rights violations. Testimony of Howard; testimony of Evans.

4. On December 20, 1993, while travelling in a vehicle on Fairmount Avenue in Philadelphia, Officers Kemper and Bevec, Pennsylvania state parole officers, noticed a man crossing the street and appearing to match the description of plaintiff, who they knew had

violated the terms of parole. Kemper and Bevec attempted to detain Gladden but he escaped on foot. Testimony of Kemper; testimony of Bevec. Kemper requested assistance, and his call was received by Officers Howard and Evans who were patrolling a nearby area in their police vehicle. Testimony of Howard; testimony of Evans.

5. An unidentified black man informed Officers Howard and Evans that Gladden entered the house located at 3917 Melon Street in Philadelphia. Testimony of Howard; testimony of Evans. The house located at 3917 Melon Street belonged to plaintiff's mother's cousin. Testimony of Gladden.

6. Officers Howard and Evans knocked on the door of the house located at 3917 Melon Street and received permission to enter. Testimony of Howard; testimony of Evans.

7. Officers Howard and Evans entered and walked toward the back of the house, where Howard saw the arm of plaintiff extending outward from behind a wall in the kitchen. Howard and Evans knew only that state officials sought plaintiff because he had violated the terms of his parole. They did not know the nature of plaintiff's crimes or his reputation for violent behavior. Testimony of Howard; testimony of Evans.

8. Officer Howard pointed his gun toward plaintiff and several times ordered plaintiff to come out from behind the wall. As plaintiff finally stepped out from behind the wall with his hands raised in the air, Evans also pointed her gun toward plaintiff. Testimony of Howard; testimony of Evans.

9. Officer Howard placed his gun in his holster and, with Evans continuing to point her gun at plaintiff, Howard placed handcuffs on plaintiff and did a quick pat-down search of plaintiff, feeling for weapons. Plaintiff did not resist. Howard did not place his hands inside the pockets of plaintiff. Howard did not find anything upon the plaintiff's person. Testimony of Howard; testimony of Evans.

10. Officer Howard did not strike the head of plaintiff. Officer Evans remained with Officer Howard during the detention of plaintiff and gave testimony, which I credit, that

Officer Howard did not strike plaintiff in the head. Testimony of Howard; testimony of Evans.

11. Plaintiff testified that he was not surprised that the arresting officers used a firearm, as the officers did not know of plaintiff or his crimes. Testimony of Gladden.

12. At the time of and during the aforementioned arrest procedures, plaintiff did not resist arrest and did not speak or shout, and there were no altercations between the arresting police officers and plaintiff. Testimony of Howard; testimony of Evans.

13. Evans called for a police wagon. Howard and Evans brought plaintiff outside the house at 3917 Melon Street. Parole officers Bevec and Kemper and their supervisor, Anthony DiBinardo ("DiBinardo"), arrived on the scene. Neither Kemper nor Bevec had any prior business or social relationship with Officer Howard or Officer Evans. Testimony of Howard; testimony of Evans; testimony of Kemper; testimony of Bevec.

14. Kemper placed handcuffs and shackles on the hands and feet of plaintiff and Howard removed the handcuffs he had previously placed upon plaintiff. Kemper searched the left side of the person of plaintiff and DiBinardo searched the right side of plaintiff. Testimony of Howard; testimony of Kemper.

15. Kemper placed his hands inside the pockets of plaintiff and found what appeared to him to be crack cocaine in three small bags within another plastic bag, about the size of a sandwich bag, and a small metal crack users' pipe approximately 2 to 3 inches in length with the circumference of a straw. Testimony of Kemper.

16. Officer Howard did not see the search made by Kemper but heard that Kemper had found drugs on plaintiff. Testimony of Howard. Officer Evans watched Kemper search plaintiff and remove the described items from the pocket of plaintiff. Testimony of Evans.

17. Plaintiff expressed no verbal reaction after Kemper found the drugs and pipe. Testimony of Gladden; testimony of Kemper; testimony of Bevec.

18. Officers Bevec, Howard, and Evans did not see Kemper plant drugs upon the

person of plaintiff. Testimony of Bevec; testimony of Howard; testimony of Evans.

19. Parole Officers Kemper and Bevec transported plaintiff to the Philadelphia Police Administrative Building ("PAB") at 8th & Race Streets. Unable to analyze the substances found upon plaintiff at that location, Officers Kemper and Bevec moved plaintiff to the 16th Police District Headquarters at 55th and Pine Streets. Testimony of Gladden; testimony of Kemper; testimony of Bevec.

20. Plaintiff did not complain to either Kemper or Bevec that he suffered a head injury at the time of arrest. Testimony of Gladden; testimony of Kemper; testimony of Bevec. Neither Kemper nor Bevec observed a wound or bleeding on the right side of plaintiff's head. Testimony of Kemper; testimony of Bevec.

21. The next day, on December 21, plaintiff was taken to the Philadelphia Detention Center, which would not accept plaintiff as an inmate due to his status as a state prisoner. Immediately thereafter plaintiff was transported back to the PAB, where plaintiff remained in a single holding cell with two or three other individuals until officials moved him to Graterford State Correctional Institution ("Graterford") on the following day, December 22, 1993. Testimony of Gladden.

22. At the intake center of the PAB George Scott ("Scott"), an emergency medical technician certified by the state of Pennsylvania who served as the administrator of health services at the PAB, medically screened plaintiff upon arrival on December 21, 1993 at approximately 11:30 A.M. Testimony of Scott.

23. At the time of trial Scott had no independent recollection of the screening of plaintiff, and the report completed by Scott did not refresh his recollection. He was only able to read his handwriting, interpret the report, and testify to the rules and his regular practices. Testimony of Scott.

24. Scott testified that it was his customary practice and procedure to interview each arrestee and make a visual observation for external health problems. As an intake person he

would record the questions and answers asked of each arrestee on a form questionnaire.

Testimony of Scott.

25. Exhibit D-3 is the form questionnaire completed by Scott when he screened plaintiff on December 21, 1993. Testimony of Scott.

26. According to the form as interpreted by Scott, Scott observed as to plaintiff no signs of illness, injury, bleeding, pain, or other symptom suggesting the need for immediate emergency medical referral at the intake session. Nor did Scott observe visible signs of cuts, bruises, or minor injuries. Exhibit D-3; testimony of Scott.

27. Pursuant to question number 9 on the form questionnaire, Scott asked whether plaintiff had fainted or had a head injury in the last 72 hours. Plaintiff responded affirmatively. Exhibit D-3; testimony of Scott; testimony of Gladden. Although the questionnaire designates a blank line available to explain such fainting or injury in further detail, that line remains blank. Scott did not fill in that line. Exhibit D-3; testimony of Scott.

28. In the general remarks section of the form questionnaire, Scott noted plaintiff's asthma and gastric ulcer but no other health problems. Scott indicated that plaintiff was alert and aware and that he made no complaint. Exhibit D-3; testimony of Scott.

29. While in the holding cell at the PAB, plaintiff fell asleep on an iron bed having no pillow, mattress, or covers. When he awoke he experienced pain on the right side of his head and found blood emanating from that location. Plaintiff asked for medical assistance and received only paper towels. Testimony of Gladden. Although Scott carefully checked for a record of any medical care given to plaintiff after the intake screening, there was none found in the place where such records are supposed to be kept. Testimony of Scott.

30. Plaintiff arrived at Graterford the next day on December 22, 1993, where plaintiff received a health examination. The intake nurse reported finding a large lump on the right top of plaintiff's head. Exhibit P-1A. Another record describes: "swollen fluctuant liquid under scalp below scabbed wound." Exhibit P-1. The examining physician, Marvin

S. Samuels, M.D. ("Samuels"), described finding a "fluctuant mass under scalp from recent blow [that] needs drainage" and classified the condition as an "acute disease." Exhibit P-1.

31. The same day Dr. Samuels prepared a consultation record referring Gladden for possible surgery, writing that Gladden had been hit on the head where a clot had formed. Dr. Samuels noted the swelling and "fluctuate liquid under scalp." Exhibit P-1B. Dr. Samuels indicated that the scalp may need an incision in order to be drained but that there was "no need to hold if transferred." Exhibit P-1B.

32. That day a doctor at Graterford made an incision to drain the clot and prescribed antibiotics and a pain reliever. Every day following the procedure plaintiff had the wound cleaned and the dressing bandage changed by a nurse. By the time plaintiff left Graterford for Rockview State Correctional Institution six weeks later, the injury had almost healed. Testimony of Gladden.

33. On May 16, 1994, the Philadelphia Municipal Court dismissed the charges against plaintiff for knowing possession of a controlled substance due to lack of evidence and witnesses. Exhibit D-9.

34. Kemper did not recall whether or not he received notice of the hearing or why he failed to attend plaintiff's hearing regarding the charge of knowing possession of a controlled substance. Testimony of Kemper.

35. Having heard the testimony of Officer Howard that he did not strike plaintiff on the head and the corroborating testimony of Officer Evans who was in close physical and visual proximity of Howard at all times in the house at 3917 Melon Street, both of whom have exemplary records with no civil complaints filed or disciplinary action taken against them for civil rights violations; having witnessed the demeanor of both officers on the stand; having found that plaintiff did not report the purported conduct of Officer Howard to Parole Officers Kemper and Bevec and that neither Kemper nor Bevec saw any indication of an injury or wound on the right side of plaintiff's head; and having read the intake report of

Scott (Exhibit D-3), which reveals only that plaintiff indicated fainting or a head injury within the past 72 hours but fails to identify any reason therefor or note any external sign of injury such as a bruise, cut, or bleeding, I find as a fact that plaintiff has failed to prove by a preponderance of the evidence that Officer Howard did, in fact, strike plaintiff at the time of arrest on December 20, 1993.

36. Having received into evidence the medical records of December 22, 1993 from Graterford that confirm the existence of a blood clot on the right side of plaintiff's head, which needed medical attention by a physician, I find that plaintiff has proven that he arrived at Graterford with a head injury but has failed to meet his burden of proving by a preponderance of the evidence that the injury resulted from a blow to the head inflicted by Officer Howard.

37. Having found that Officer Howard executed a quick pat-down of Gladden inside the house at 3917 Melon Street to search for weapons, without reaching inside the pockets of plaintiff, and that Officer Evans watched Officer Howard perform the pat-down without reaching inside the pockets of plaintiff, and having further found that Kemper was the only officer to reach inside the pockets on the left side of plaintiff and that Kemper pulled out from a pocket on the left side of plaintiff a small bag of what he had reason to believe was crack cocaine and a metal crack users' pipe, within the sight of Officer Evans who saw Kemper search plaintiff, I find that plaintiff has failed to prove by a preponderance of the evidence that Kemper falsely planted the drugs upon the person of plaintiff.

Conclusions of law³

38. After the motions for summary judgment, the remaining claims of Gladden for disposition at trial involved allegations that (1) Officer Howard used excessive force at the

³To the extent that these conclusions of law include findings of fact or mixed findings of fact and conclusions of law, those findings and conclusions are hereby adopted by this Court.

time of the arrest by striking plaintiff on the head, in violation of 42 U.S.C. § 1983, (2) Officer Howard committed the intentional torts of assault and battery by the same conduct; (3) Officers Howard and Evans conspired to use excessive force against plaintiff at the time of the arrest and (4) Officers Howard and Evans conspired to falsely charge plaintiff with possession of a controlled substance. Having found that the claims arise pursuant to 43 U.S.C. §§ 1983, 1985 and the state law of Pennsylvania, this Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1367.

39. Having found that defendants Howard and Evans were acting under color of state law at the time they detained and arrested plaintiff on December 20, 1993, plaintiff has satisfied the first element of a claim pursuant to 42 U.S.C. § 1983. See Kost v. Kozakiewicz, 1 F.3d 176, 184 (3d Cir. 1993) (stating plaintiff must prove that the conduct complained of was committed by a person acting under color of state law and that the conduct deprived plaintiff of the rights, privileges, or immunities secured by the Constitution or laws of the United States).

40. Having failed to prove that Officer Howard struck him on the head and having failed to prove the cause of the wound found when he arrived at Graterford, plaintiff has failed to satisfy the second element necessary to prove a claim pursuant to 42 U.S.C. § 1983 for excessive force.

41. Having found no evidence that plaintiff was in fear of injury by the arresting officers at the time of the arrest executed by Officers Howard and Evans, plaintiff has not met his burden of proving that Officer Howard committed the intentional tort of assault. See Proudfoot v. Williams, 803 F. Supp. 1048, 1054 (E.D. Pa. 1992) ("[A]n assault occurs when one acts with the unprivileged intent to put another in reasonable and immediate apprehension of a harmful or offensive conduct and which does cause such apprehension."); Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994) ("Assault is an intentional attempt by force to do an injury to the person of another.").

42. Having found that plaintiff has failed to prove that Officer Howard struck plaintiff in the head, plaintiff has not met his burden of proving that Officer Howard committed the intentional tort of battery. See Moser v. Bascelli, 865 F. Supp. 249, 252 (E.D. Pa. 1994) ("[T]he elements of the tort of battery are a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent."); Renk, 641 A.2d at 293 ("[A] battery is committed whenever the violence menaced in an assault is actually done, though in ever so small a degree, upon the person.").

43. Having found that Kemper found plaintiff in possession of an illegal substance, plaintiff has failed to prove that Kemper was without probable cause to arrest plaintiff. See Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988) ("The proper inquiry in a section 1983 claim based on false arrest or misuse of the criminal process is . . . whether the arresting officers had probable cause to believe the person arrested had committed the offense."); Smith v. Borough of Pottstown, No. CIV.A.96-1941, 1997 WL 381778, at *11 (E.D. Pa. June 30, 1997) (finding that plaintiff cannot maintain a claim of false arrest pursuant to 42 U.S.C. § 1983 where police officers had probable cause to arrest plaintiff).

44. Having found that Officer Howard did not use excessive force at the time of plaintiff's arrest and that Officer Kemper did not plant the drugs he found upon plaintiff's person and thus had probable cause to arrest plaintiff for possession of an illegal substance, plaintiff has failed to prove by a preponderance of the evidence that Officer Howard and Officer Evans conspired to violate the civil rights of plaintiff in violation of 42 U.S.C. § 1983. See Defeo v. Sill, 810 F. Supp. 648, 658 (E.D. Pa. 1993) ("Without an actual deprivation, there can be no liability under § 1983."); accord Thompson v. City of Lawrence, 58 F.3d 1511, 1517 (10th Cir. 1995) (Plaintiff must prove existence of a conspiracy and the deprivation of a constitutional right); Hale v. Townley, 45 F.3d 914, 920 (5th Cir. 1995) (A conspiracy claim is not actionable without an actual violation of § 1983.).

45. Having found that plaintiff is an African American, Officer Howard is an African American, and Officer Evans is an African American, and plaintiff having failed to produce any evidence of racial or other class-based discriminatory animus, plaintiff has not sustained his burden of proving by a preponderance of the evidence that Officer Howard and Officer Evans conspired to deprive plaintiff of the equal protection of the laws pursuant to 42 U.S.C. § 1985. See Bieros v. Nicola, 860 F. Supp. 223, 226 (E.D. Pa. 1994) (Failure to allege racial or otherwise class-based discriminatory animus warrants dismissal of claim brought under 42 U.S.C. § 1985.).

Verdict

Having found that Officer Howard did not strike plaintiff in the head at the time of the arrest, that Officer Kemper did not falsely plant drugs upon the person of plaintiff and had probable cause to arrest plaintiff, and that Officers Howard and Evans did not conspire to exert excessive force at the time of arrest or to falsely charge plaintiff with possession of a controlled substance, I conclude that the claims of Gladden against Officers Howard and Evans must fail. Accordingly, my verdict is in favor of defendants Officer Derek Howard and Officer Thelma Evans.

An appropriate Judgement follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

THOMAS E. GLADDEN,

:

CIVIL ACTION

Plaintiff,

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v.

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BOBBY KEMPER, ET AL.,

:

:

Defendants.

:

NO. 94-1876

JUDGMENT

AND NOW, this 30th day of July, 1997, **JUDGMENT IS HEREBY ENTERED** on the verdict in favor of defendants Derek Howard and Thelma Evans and against plaintiff Thomas Gladden.

LOWELL A. REED, JR., J.